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OGC 73-0337

28 February 1973

MEMORANDUM FOR THE RECORD

SUBJECT: Availability of CIA Personnel Files to Employees

1. The trend of the day surely is that personnel files must be made available to the employee concerned. I understand both Foreign Service and military regulations now specifically require this with respect to the people in those services. A Civil Service regulation is to the same effect.

2. Under Section 294.703 of Chapter I, Title 5, of the Code of Federal Regulations, the "Official Personnel Folder of a Government employee or former Government employee shall be disclosed to him" and to certain persons authorized by him. The "disclosure must be in the presence of a representative of the agency having physical custody of the folder." That Section applies with respect to the Official Personnel Folders of each executive department and independent establishment of the executive branch, of which CIA is one (5 U.S.C. 101, 104).

3. On its face, the foregoing language would require that CIA personnel files be made available to the employee, but this raises the question as to the authority of the Commission to so order with respect to CIA. The regulation (Section 294) provides that it is issued pursuant to the authority of Section 1104 of Title 5 of the U.S. Code, but that Section merely authorizes the Commission to execute, administer and enforce "the civil service rules and regulations of the President and the Commission and the statutes governing the same." I find no statute governing the availability of personnel files. An executive order, E.O. 10561, does provide for the establishment of such files and authorizes the Commission to prescribe regulations "governing the establishment, content, maintenance, and transfer among agencies" of official personnel files. I think it could be argued that the delegation of authority to regulate in those areas

is not authority to regulate that the Official Personnel Folder must be disclosed to the employee, but I find no other authority for Section 294.703 and the Special Assistant General Counsel - Legal Advisory of the Civil Service Commission advises that the regulation is based on that delegation. In view of the Commission's views and the trend in favor of employees in this area, it seems highly likely that Section 294 would be regarded as a valid requirement for the availability of files to employees. In any event, if that Section is a proper exercise of Civil Service Commission authority, I believe it applies to CIA as much as to any other agency.^{1/}

4. In practical terms, there remains the question of whether the Agency may elect to withhold personnel folders from employees, notwithstanding Section 294. The important way in which this issue would be raised is that it could become a significant point in the course of litigation which challenges the validity of a decision by the Director terminating someone's employment. The authority of the Director to terminate is in very broad terms. He may terminate "whenever he shall deem such termination necessary or advisable in the interests of the United States" and he may do this notwithstanding "the provisions of any other law". In light of this strong language and the perhaps questionable basis for Section 294, I think it unlikely that a termination would be set aside because of a refusal to make the personnel file available.



Associate General Counsel



^{1/} This conclusion follows from the provisions of E.O. 10561. That Order requires agencies to establish Official Personnel Folders for employees in the competitive service, which folders fall under the jurisdiction and control of the Commission. Departments are also required to establish such folders with respect to non-competitive service employees and these folders are under the control of the department involved. But the Commission's authority to regulate concerning the establishment, content, maintenance and transfer of folders extends to the folders "relating to any employee to which this order is applicable."

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Original - RECORDS subj ✓

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TRANSMITTAL SLIP		DATE 28 February 1973
TO: D/Personnel		
ROOM NO. 4E56	BUILDING Hqs.	
REMARKS: Harry: In view of the current importance in this area, it seems desirable to explore the law as to whether CIA personnel files must be made available to employees. My attached memorandum resulted.		
<div style="text-align: right;">  cc: DDP DDP/PEC </div>		
FROM: Associate General Counsel		
ROOM NO. 7D07	BUILDING Hqs.	EXTENSION 
FORM NO. 241 1 FEB 55		

REPLACES FORM 36-8 WHICH MAY BE USED.

NOTE ATTACHED TO MEMORANDUM FOR THE RECORD DATED 28 FEBRUARY 1973 (OGC 73-0337)